Information

Government of Canada / Gouvernement du Canada

AMENDMENT OF THE COPYRIGHT ACT

Spring 1987

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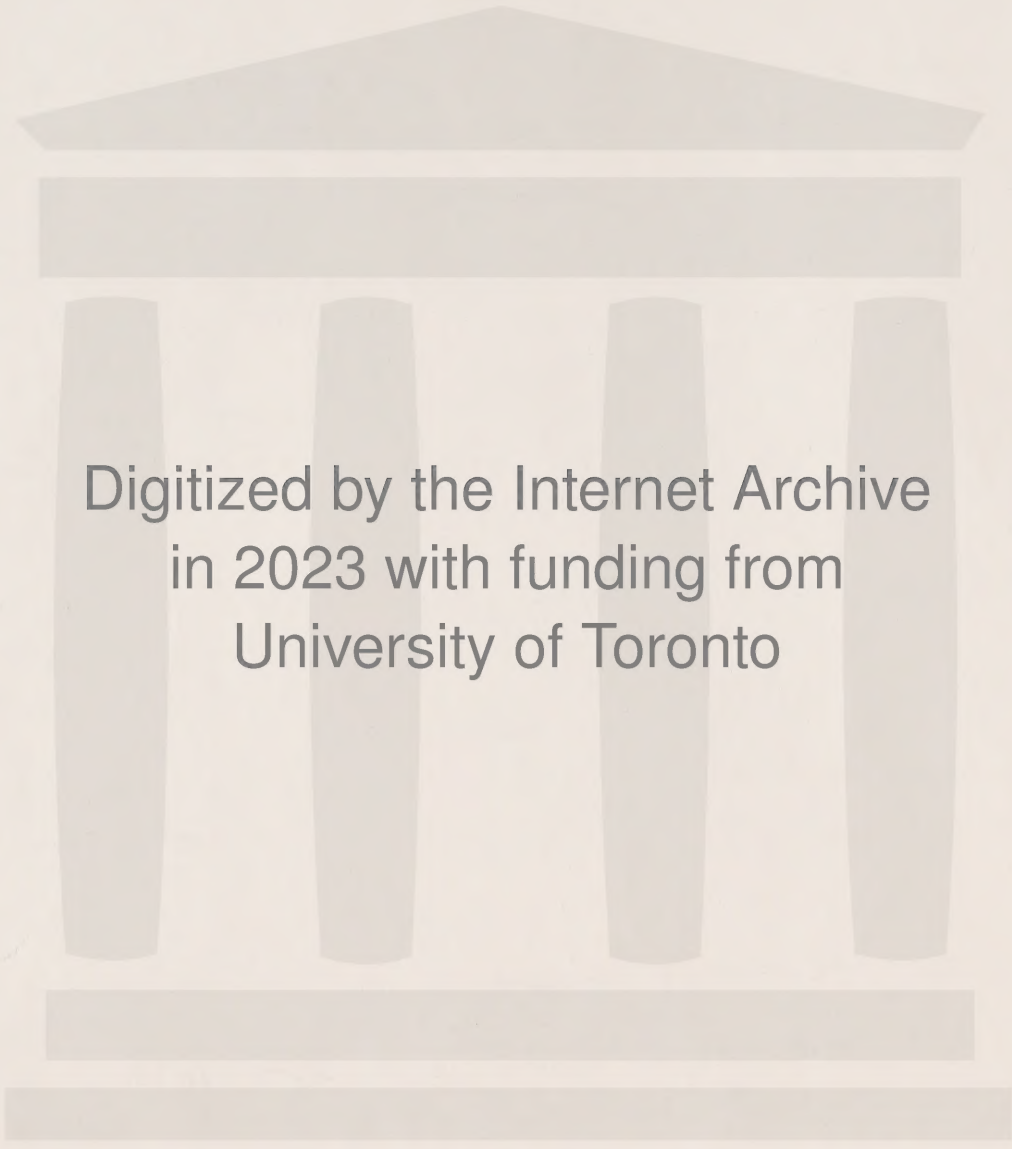
Canada



What is Copyright?

Originally, copyright meant the exclusive right to control copying; only the creator was entitled to copy his or her work or give someone else permission to do so.

Copyright protection has now evolved so that it includes the exclusive right to publish, produce, reproduce, translate, broadcast or adapt a work, or perform it in public. Copyright applies to all original literary, dramatic, musical and artistic works; examples are books, songs, sculptures, paintings, photographs and films. Records, audio and video tapes are also protected by copyright.

In Canada, copyright automatically exists upon creation of an original work if the creator is a Canadian citizen or resident, or is otherwise qualified under the Copyright Act.

Creators own the copyright in their work unless they are employed by some other person to create the work. In this case the employer owns the copyright.

Copyright law allows for the exercise of economic rights as well as moral rights. Economic rights may be sold by the creator or transferred or licensed to others to facilitate economic exploitation. In 1986, industries relying directly on copyright contributed nearly $10 billion to the Gross National Product.

Moral rights encompass the right of paternity (the right to claim authorship of one's work) and the right of integrity (the right to restrain distortion of one's work). Moral rights attach to the person of the creator; they may be waived but cannot be assigned to others.

Generally speaking, the term of copyright protection in Canada is the lifetime of the author and 50 years thereafter. After copyright expires, artistic, literary, dramatic and musical works are considered to be in the public domain and are freely available for public use without permission or payment.

The new law will balance the needs of creators to control and be paid for the use of their work with the needs of users to have the easiest and widest possible access to copyright material. It will increase the rights of creators, expand the protection of subject matter and provide fewer exceptions for users, thereby contributing to economic renewal and cultural vitality.

International Copyright Protection

Canada is a member of two international copyright conventions -- the Berne Convention and the Universal Copyright Convention. These conventions require each member country to grant the protection of its copyright law to the works of nationals of other member countries. The Universal Copyright Convention provides somewhat lower standards of protection than the Berne Convention.

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Background on Amendment of the Copyright Act

The Copyright Act has not been substantially revised since 1924, the year it was proclaimed. The intervening years have witnessed the advent of radio, television, photocopiers, audio and video tape recorders, computers, satellites and a host of information storage and retrieval devices. All of these have become common instruments for the use and exploitation of intellectual property. Technological, economic and cultural change have made some of its provisions obsolete, and have resulted in lack of effective protection for major sectors of creative activity.

In November 1984, the government characterized revision of the Copyright Act as an urgent priority matter, and in the economic statement of the Minister of Finance, A New Direction for Canada, an Agenda for Economic Renewal, the government stated that revision was to proceed following extensive consultations.

In January 1985, the White Paper on Copyright, From Gutenberg to Telidon, was referred for study to the Standing Committee on Communications and Culture. An all-party Sub-committee on the Revision of Copyright was immediately formed. In the course of the year, the Sub-committee received over 300 briefs and heard 111 witnesses at public hearings. Finally, on 10 October 1985, the Sub-committee submitted its recommendations to the House in its report A Charter of Rights for Creators. The Sub-committee stated that creators make a special contribution to Canadian society, and that they must be compensated for the constantly increasing use of their works. Copyright legislation, therefore, must reflect the legal recognition of the exclusive right of creators to determine the use of their works and to share in the benefits produced by that use.

On 7 February 1986, in its response to the report of the Sub-committee on the Revision of Copyright, the government endorsed the thrust of the Sub-Committee's report and the majority of its recommendations. In addition, the government at that time characterized copyright revision as an urgent priority matter, and noted that the failure of the law to deal with technological advances resulted in difficult situations for creators, consumers and copyright-based industries. The economic importance of the legislation was identified as a central consideration, as was the fundamental importance copyright has for Canadian creators.

The government has now introduced a Bill to amend the Copyright Act which addresses: computer programs, anti-piracy remedies, the relationship of the copyright and industrial design legislation, the Copyright Board, the collective management of copyright, moral rights, protection of choreographic works, the abolition of compulsory licences for the making of sound recordings and the right to exhibit artistic works in public. A second package of amendments is in preparation and will be introduced as soon as legislative drafting is complete.

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Computer Programs

Current situation

Computer programs, or software, form an increasingly large share of the overall computer industry. In Canada, revenues for systems and applications software and for custom system development are forecasted to be $1.5 billion in 1986, having grown at 25 to 30 percent per year in the 1980s. Small, powerful computers are now widespread in offices and homes, and a vast selection of software for them is available in retail stores.

Last spring the Federal Court of Canada cited sections of the Copyright Act to rule that computer programs are protected by copyright law. The main issue in the case was whether a program stored in semiconductor chips was an original piece of written work translated into code. The Court declared that computer software is creative work in either written form or machine language and is therefore entitled to full copyright protection. However, that particular case is being appealed. In Australia, whose 1968 Copyright Act has provisions similar to Canada's, a decision to extend protection to cover the same programs was eventually overturned by the highest Court. This leaves the legal situation of protection for computer programs in Canada less than certain.

Why change?

Without clear legislation or case law, the computer software industry in Canada has had to develop new or improved software programs under uncertain conditions. Companies are understandably reluctant to spend money and

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time to create a program when a competitor can copy their original work in the 30 seconds it takes to duplicate a disk. Despite impressive growth, the industry loses millions of dollars annually to unauthorized copying.

To eliminate the uncertainty facing the industry, clear statutory protection for computer software is urgently needed. Under the proposed amendments, computer software producers will have the full weight of the law behind them should civil or criminal action be necessary to protect their work.

The proposed changes are in line with the protection offered by our major trading partners. The United States, the United Kingdom, France, Japan, and most other industrialized nations now provide explicit copyright protection for computer programs. Similar treatment among trading partners allows for increased opportunities in sharing technological expertise, and facilitates business arrangements.

Changes

Under the amendments, computer programs will be defined as literary works, regardless of the medium of expression, and will be eligible for full copyright protection for the life of the creator plus 50 years. This treatment follows Canadian case law to date and will ensure continuity of protection. It is also consistent with the manner of protecting programs chosen by most of Canada's trading partners.

There will be two exceptions to copyright infringement relating specifically to computer software. The first will allow those in lawful possession of a computer program to alter it to suit their personal needs or to adapt it without infringing copyright. The second will allow limited making of back-up copies, as present storage media for computer programs are very fragile. In effect, the new law will allow what has become standard practice in the industry.

It is important to note that computer programs will be protected by copyright even if they were created prior to the effective date of this amendment. However, any alleged civil infringement or criminal offence that occurred prior to the tabling of the amendment will be adjudicated on the basis of the law in force at the time of the alleged infringement.

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Piracy

Current situation

Commercial piracy of films, records and computer software is growing steadily in the absence of stiff penalties. Cheap, high-quality copying of virtually all types of copyrighted material is now possible. The potential for profit in piracy is substantial, and the activity is flourishing. Given the current fines available under the Copyright Act, which range from $10 per copy up to a limit of $200 per transaction, it is not surprising. These fines have not increased since the Act came into force in 1924.

Pirates have also been prosecuted under the fraud provisions of section 338 of the Criminal Code. But this statute was never intended to deal with copyright piracy as such. While the courts found section 338 to be technically applicable in the absence of effective copyright penalties, this application has left both the courts and the government uncomfortable. What is needed are provisions specifically designed to combat copyright piracy. The logical means of enacting such provisions is to include them in the Copyright Act.

Why change?

Revenue from the sale of sound recordings in Canada amounted to over $600 million in 1985. It is estimated that a further $40 million worth of pirated records and tapes were bought in that year. Pirated video cassettes may account for as much as 15 to 20 percent of the legitimate

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market, whose retail value was some $530 million in 1984. Estimates of pirated software vary widely. For some popular applications packages, there may be at least one pirated copy in use for every package authorized by the publisher.

There is also profit in marketing illegally-made books and works of art, and the severe new penalties are intended to cover piracy no matter what the form of copyrighted material.

Increased penalties will send a strong signal that piracy will not be tolerated. Canada's cultural, entertainment and information industries will be encouraged to expand, confident that their creative endeavours will be adequately protected from piracy. A tougher stand on piracy is in line with actions recently taken by Canada's major trading partners.

Changes

With these amendments the law will specify that any person who sells, distributes, exhibits or imports for sale any infringing copy of a work is guilty of an offence. The offender will be liable on summary conviction to a maximum fine of $25 000 or to a prison term up to six months, or both. The maximum fine for indictable offences will be $1 million, with imprisonment for up to five years, or both.

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Relationship between Copyright and Industrial Design

Current situation

Recent court decisions have clouded the relationship between the Copyright and Industrial Design Acts and potentially extend copyright to purposes for which it was never intended.

It has generally been accepted in Canada that there should be free competition, without the restrictions imposed by intellectual property rights, in manufacturing certain articles that do not warrant protection either by patent or industrial design law. It was thought, for example, that making a three-dimensional utilitarian object such as a tailpipe or gear mechanism would not infringe the copyright of the two-dimensional drawing on which it was based. Utilitarian or functional items such as tailpipes were not considered eligible for intellectual property protection. That is because they were normally neither decorative and thus eligible for industrial design protection, nor sufficiently inventive to be eligible for patent protection.

Recent judicial decisions, however, have raised the possibility that these objects could become eligible for full copyright protection. Anyone manufacturing such items would then have to seek authorization and pay royalties or licence fees. This would mean higher costs, which would be passed on to consumers. Indeed, these firms could in fact be prevented from competing at all with the original makers of such items for the life of the creator plus 50 years.

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Why change?

The uncertainty posed by lawsuits underway in Canada underlines the need to clarify the present wording of the law. To delay revising industrial design legislation might transform the Copyright Act into catch-all legislation to protect works for which copyright is not appropriate. The Sub-Committee on Revision of Copyright recommended immediate action to eliminate this possibility. Failure to clarify the link between the Copyright and Industrial Design Acts could have a profoundly negative effect on Canada's manufacturing industry.

Changes

The Bill provides precise rewording to resolve the ambiguities resulting from recent court decisions. The amendments provide an objective means of determining whether an article can be protected by copyright, industrial design, both, or neither. The amendments restate and declare explicitly what the government and most of the private sector always thought the law was in Canada. To avoid disruptive uncertainty, the changes also apply to any alleged infringement that may have occurred before they come into force.

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Copyright Board

The Copyright Appeal Board will be reconstituted under the new legislation and its jurisdiction will be enlarged. It will be known simply as the Copyright Board.

The present Copyright Appeal Board, established in 1938, is primarily a rate-setting body with power to approve or alter the rates submitted annually by copyright societies that manage performing rights for musical works. Despite its name, it does not in fact hear appeals. It has three unpaid part-time members.

The new tribunal will assume the present Board's functions. In addition, it will be given two new responsibilities:

(1) It will have the power to fix royalty rates for societies set up to license particular aspects of copyright other than musical performance rights. It will set rates only when private negotiation fails between a licensing body and copyright users and when one of the parties applies to the Board for arbitration. When an agreement containing a tariff is voluntarily filed with the Board, the Director of Investigation and Research appointed under the Competition Act may ask the Board to examine it if the Director considers the agreement to be contrary to the public interest.

(2) It will license use of copyright works when the copyright owner cannot be located. Persons wishing to use such works must apply to the Board, demonstrate that reasonable efforts have been made

to find the copyright owner, and undertake to pay the royalty prescribed by the Board if the copyright owner is located within five years of the termination of the licence.

In future, the Board will be required to give reasons for its decisions. It will have the right to subpoena witnesses, the right to hear evidence under oath and the right to require the production of documents. The Federal Court will have the power to review decisions of the Board on points of law.

Members of the Copyright Board will be appointed for five-year terms by the Governor in Council. They will be subject to removal only for cause and will be prohibited from dealing in copyrights or having any financial interest in a business that deals in copyrights. The Chairman must be a judge (either sitting or retired) of a superior, county or district court. The Chairman and Vice-Chairman will be full-time appointees. Up to three more people may be appointed to the Board as either full-time or part-time members. Public servants are prohibited from being members.

Staff to support the Board's work will be appointed under the Public Service Employment Act. In addition, the Board will be able to engage the temporary services of experts according to Treasury Board guidelines.

The Minister responsible will table the Board's annual report in Parliament each year.

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Collective Management of Copyright

Individual creators or copyright owners may authorize a copyright "collective" to manage access to all their works. The society collects royalties on all copyright works under its control and distributes them to members.

Collective management of copyright benefits both copyright owners and copyright users. For copyright owners, it is a practical approach to the administration of rights that are difficult to exercise effectively on an individual basis. For users of copyright works, it streamlines access to large volumes of copyright material.

The concept is not new in Canada. For example, collectives presently exist for musical works. Country fairs planning musical performances do not have to contact composers individually to obtain permission to use their work. Instead, they deal with the two performing rights societies -- the Composers, Authors and Publishers Association of Canada (CAPAC) and the Performing Rights Organization of Canada (PRO Canada). For the sum of $5 a day, paid to each performing rights society ($10 a day), small fairs have full access to a world repertoire of music. CAPAC and PRO Canada have been in operation for more than 40 years, licensing the right to broadcast or publicly perform musical works by Canadian and foreign composers.

In Quebec, teachers can legally photocopy substantial extracts from a repertoire of 17,000 titles under a blanket agreement between the Quebec Ministry of Education and the Quebec Writers' Union (Union des écrivains du Québec). The Ministry of Education is paying $1 million a year to cover photocopying of printed works by educational institutions in the province. The union distributes royalty payments to its members according to the use made of their works.

Examples of other copyright collectives set up in recent years are:

° Vis-Art, a non-profit group of painters, photographers, designers and sculptors established in 1984 to manage rights to commercial reproduction of members' works.

° La Société pour l'avancement des droits en audio-visuel (SADA), established in Quebec in 1979 to manage copyright on behalf of companies engaged in producing and distributing audio-visual materials.

The only collectives mentioned in the current Copyright Act are musical performing rights societies, although there is nothing in the law to prevent the formation of collectives licensing other uses of copyright material. The Act requires performing rights societies to submit their proposed statement of rates to the Copyright Appeal Board every year for approval or alteration. Other collectives are not subject to rate regulation and can charge the public any fee they like. They are, however, subject to the provisions of the Competition Act -- a fact that has tended to discourage the formation of new collectives.

Certain classes of copyright owners who want to form collectives have been reluctant to do so for fear of prosecution under the Competition Act. To provide encouragement, the proposed law sets up a system of voluntary submission to regulatory review.

Collectives which privately negotiate their rates with users and then file the agreement with the Copyright Board will be exempt from the Competition Act. Users may also file the agreement with the Board. Once a collective or a user has filed such an agreement, the Director of Investigation and Research appointed under the Competition Act can request the Board to examine the tariff and its related terms and conditions to determine if they is in the public interest. The Board will then approve or alter the tariff, or related terms and conditions.

A collective that does not file its licensing agreements with the Copyright Board will automatically be subject to the terms of the Competition Act.

In a situation where the collective and the user are unable to agree, either party will be able to ask the Copyright Board to aribtrate. Such a case would not be subject to the Competition Act.

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Moral Rights Expanded

Artist Michael Snow obtained a court injunction in December 1982 ordering the Toronto Eaton Centre to remove red ribbons from the necks of the 60 geese forming his sculpture "Flight Stop". The artist argued that his honour and reputation had been damaged by the addition of ribbons to his composition, which he compared to dangling earrings from the Venus de Milo.

Snow's action was an exercise of the moral right of authors to have the integrity of their work respected. The new law will reinforce this right in two ways.

(1) By removing the requirement to prove that modification of an artistic work is prejudicial to the creator's honour and reputation.

If someone modifies a painting or sculpture without the artist's consent, the change will automatically be assumed to be prejudicial. However, legitimate conservation or restoration and changes in the location of a work will be permitted.

(2) By giving creators legal recourse against the unauthorized use of their work in association with products, services, causes or institutions, in ways that are prejudicial to their honour or reputation.

The new legislation will also expand the moral right of "paternity". Creators already have the statutory right to be identified as the author of their work. The amendment gives them the additional right to remain anonymous or to use a pseudonym.

Stronger remedies will be available to creators whose moral rights are infringed. The revised law will provide the same treatment for moral rights as for economic rights. The 1924 Copyright Act entitles creators to apply for an injunction to stop infringement of their moral rights. Under the revised legislation, they will also be able to sue for damage to their honour or reputation.

Because honour and reputation are personal matters, moral rights can only be exercised by the creator. They cannot be assigned to another party, although the creator can choose not to exercise them. For example, an author whose best-selling novel is to be made into a film could waive the right to approve all modifications to the original text.

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All Choreography Specifically Protected

Under the present legislation, choreography qualifies for copyright protection within the category of dramatic works.

The revised legislation will ensure that copyright protection is available to all choreographic works whether or not they have a dramatic plot or story line.

While dramatic themes are central to traditional ballets such as Giselle or The Sleeping Beauty, the same is not true of modern works such as Balanchine's Concerto Barocco.

Glass Houses, a work by Toronto choreographer Christopher House, is a Canadian example of choreography that is not constructed around a dramatic plot. House's fellow choreographer David Earle said that in this work, "you experience the absolute thrill of form, something so pure and potent, with no confusion of ideas." Dances by Montreal-based choreographers Paul-André Fortier (Images Noires) and Édouard Locke (Orange) are other examples.

Contemporary choreographic works may or may not have "storyline, psychological analysis, emotion, music, noises, silence, mood, character," Elise Orenstein of the Canadian Association of Professional Dance Organizations told the Sub-committee on the Revision of Copyright. Choreography, in her words, is essentially an "arrangement in time and space using human bodies as design units."

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Mechanical Reproduction Licences Abolished

A basic principle of the copyright regime is that creators must have the right to decide how their works are used and to share fairly in the economic benefits derived from their use.

Under the 1924 Copyright Act, a restriction was placed on musical copyright through a provision known as the compulsory licensing of mechanical reproduction rights. Once a musical work has been recorded, any record company is entitled to record the work providing they follow the established procedure and pay a royalty of "two cents for each playing surface on each record and two cents for each perforated roll or other contrivance" to the copyright owners.

Technological advances in the music industry such as long-playing records, audio cassettes, music videos and compact discs make the wording of the 1924 Act sound strangely archaic. To those in the music industry, the current payment of two cents a song is equally outdated. Bobby Gimby's song "Canada" was a top hit, with sales of 300,000 records. As music industry representatives pointed out in March this year, royalties for this song under compulsory licensing would amount to $6,000, split evenly between the composer and the publisher.

In another example, "Je ne suis qu'une chanson" with words and music by Quebec songwriter Diane Juster also earned royalties totalling $6,000 when issued on a Ginette Reno album that sold 300,000 copies.

Abolition of the compulsory licensing of sound recordings means that composers will have full control over who records their music and under what circumstances. They will no longer be forced to sell at a price arbitrarily set by legislation.

A six-month transition period after the amendment comes into force will allow the completion of recordings already in production under the terms of current legislation.

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Right to Exhibit Works of Art in Public

Artists have long claimed that they do not enjoy the same right to benefit from their work as other creators, for example in the public presentation of their work. At present, their paintings and sculptures can be exhibited with no payment of royalties.

Under the new law, exhibition rights will become an integral part of copyright that can be exercised like other economic rights.

In fact, most major public art galleries and museums voluntarily follow the exhibition fee schedule established by Canadian Artists' Representation/Le front des artistes canadiens (CARFAC). The amendment establishes in law a practice that is widely followed in the visual arts community.

Artists are not getting rich on the amounts involved. A 1980 study by Judy Gouin for Canadian Artists' Representation Ontario found that exhibition fees per artist averaged about $480 a year, while total annual income from work as an artist averaged less than $6,000. As a percentage of public art gallery expenses, artists' fees represented a tenth of one per cent of total operating costs in 1981, according to a Canada Council study.

The new exhibition right will extend only to works made after the new law comes into force, but will not apply when art is displayed for the purpose of sale or rental.

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